SUPREME COURT, U. S.
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-820

MICHAEL J. FINK,
Petitioner

vs.

UNTIED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Ccurt of the United States:

The Petitioner, MICHAEL J. FINK, hereby Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals (Appendix A) is attached hereto and made a part hereof.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 7, 1974.

A petition for Rehearing was filed and the same was denied on December 6, 1974.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT FAILED TO APPLY THE LAW AS STATED IN WASHINGTON v. U. S., FIFTH CIRCUIT COURT OF APPEALS, 1960, 275 F.2d 667; ROCHA v. U. S. FIFTH CIRCUIT COURT OF APPEALS (1968) 401 F.2d 529; U. S. vs. ROBINSON, FIFTH CIRCUIT, 1971, 446 F.2d 562.

2. WHETHER THE FIFTH CIRCUIT ERRED WHEN IT ALLOWED TESTIMONY WHICH WAS REMOTE AND HEARSAY IN CHARACTER AS REBUTTAL TESTIMONY AGAINST CO-DEFENDANT TO THE PREJUDICE OF THE PETITIONER.

STATEMENT

Following the jury trial in the United States District Court for the Middle District of Florida, Petitioner was convicted on all of the three counts.

The following persons played prominent roles in the trial of this cause: John A. Geders, Defendant, de-

fended by Ralph Rinehart, attorney; Michael J. Fink, Defendant, defended by James Clark, attorney; Randy Kilgore, Defendant, who had plead guilty prior to trial and testified on behalf of the Government; Steven Patrick, Defendant in a related indictment who had previously plead guilty and testified on behalf of the Government; David Butler, pilot and Government informer; Tom Waddington, deceased, alleged co-conspirator; James Mahoney, co-defendant whose trial was severed and Randolph Surles, co-defendant whose trial was severed.

The Defendants, John A. Geders and Michael J. Fink were jointly indicted along with other Defendants in an Indictment charging the Defendants with: (1) Conspiracy to import marijuana (2) Importation of Marijuana, (3) Possession of Marijuana with Intent to Distribute Same.

Trial of the Defendants Fink and Geders commenced on the 9th day of October, 1973, in the District Court in and for the Middle District of Florida. The two Defendants were convicted on all three counts.

Randy Kilgore and Steven Patrick testified that they and the two Defendants had entered into a conspiracy to import marijuana into the United States.

Randy Kilgore contacted David Butler, the informant in Miami and David Butler flew to Tampa on two occasions.

The first occasions he flew Defendant Geders and Randy Kilgore to LeHigh Acres to show them a possible landing site for smuggling activities.

On that trip to Tampa, he brought with him cocaine described as several ounces to one-half pound.

He told Defendants Geders and Randy Kilgore that he was able to bribe customs officials in the Bahamas for safe passage through customs, he was able to get through the United States radar screen, had performed several smuggling trips in the past, and that if the Defendants would go in with him that they would be millionaires in a year.

He returned to Tampa on the 24th day of November, 1972 and met all of the other alleged conspirators.

At that time, it was agreed that he would fly the Defendant Geders and the Defendant Mahoney to Columbia, South America and return with 1,000 pounds of marijuana in exchange for $10,000.00 cash, $2,000.00 to $3,000.00 expenses, and fifty pounds of marijuana worth $12,500.00.

At that time, David Butler, the informant arranged all of the details of the trip, told the Defendants to purchase walkie-talkies for communication between the plane and persons on the ground, to purchase tacks to throw in the road in the event of pursuit, to rent a camper upon which to load the marijuana after the plane landed, to purchase extra gasoline so the plane could be refueled upon unloading and told the Defendants where to land, what escape route to take and the time of departure and arrival.

On Sunday morning, November 26, 1972, David Butler, the informant, James Mahoney and John Geders, Defendants, flew to Columbia, South America, by way of Inagua, Bahamas. On the return trip they landed at Inagua, Bahamas, where David Butler, the informant, claimed he had customs officials bribed.

While David Butler was talking to the customs officials, a native warned the Defendants that David Butler was radioing ahead and the Defendants would be arrested when they returned to the United States.

Upon David Butler's return to the airplane, Defendants informed him of the native's conversation. David Butler claimed the native was only trying to get money from them.

Immediately after the plane took off, the Defendants Geders and Mahoney became frightened and tried to get David Butler to slow the plane down so they could open the doors and dump the marijuana into the ocean.

Although Defendants tried on several occasions to dump the marijuana, David Butler refused to cooperate by slowing the plane down.

He landed the plane in Lee County in the State of Florida. The marijuana was transferred from the plane to the camper, and the two Defendants, Mahoney and Geders, left in the airplane with David Butler.

The camper, driven by Steven Patrick and escorted by Michael J. Fink and Randy Kilgore, left the landing site. The camper was seized by Customs Agents who were waiting for the plane to unload and Michael Fink parked his automobile in a graveyard after being chased by customs patrol officers.

Steven Patrick was arrested immediately with the camper and the other Defendants were not arrested until after the Indictment filed in this cause.

Prior to the trial of this cause, the Defendants made numerous motions for orders authorizing the taking of depositions. These motions were denied.

At the trial of this cause, Defendant sought to interview various Government witnesses, all of whom refused to confer with Defendants' counsel. Defendant moved the Court to enter an order requiring said witnesses to confer with them. This motion was denied by the Court.

At the trial, the Defendants called David Butler, the informant, as a witness and he invoked his Fifth Amendment privilege not to testify.

The Defendant Geders took the stand and testified in his own behalf. After he had testified on direct the Court ordered him not to confer with his counsel for a period of 16½ hours.

After Defendants had rested, the Government called Agent Charles Hudson who testified that he had examined investigative reports in the Hillsborough County Sheriff's Office and interviewed informants who claimed that the Defendant Geders had been involved in previous smuggling activities.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals' decision in affirming the conviction of Petitioner did not consider *Hansford v. U. S.*, 303 F.2d 219, 1962. When the Court in reversing the conviction stated:

> " Testimony by police officer in rebutting claim of entrapment in sale of narcotics as to prior alleged sales made by defendant which officer claim-

ed he had witnessed was inadmissible and prejudicial when testimony of officer was not corroborated by production of alleged contemporaneous police report or otherwise substantially corroborated." *Hansford v. United States of America,* 303 F.2d 219, 1962.

. The factual situation in the present case is also very similar to the factual situation in the case of *U. S. vs. Johnston,* 426 F.2d, 112, 1970. The Court held as follows:

> ". . . admission of the police officer's testimony was error and that the "searching inquiry" into defendant's conduct and predisposition, of which Sorrells speaks, must be controlled in some reasonable manner. As the single incident occurring nine months prior was without corroborating witnesses, was not the subject of an arrest, indictment or conviction, defendant had no opportunity to prepare to defend against it apart from his own unsupported denial. This was considered to be so prejudicial as to outweigh the probative value of the testimony of the issue of predisposition. . ." *U. S. v. Johnston,* 426 F.2d 112, 1970.

Also, see *United States v. Ambrose,* 483 F.2d 742, 1973, which had an almost identical factual situation in reference to this question. In this case, the Government had called Agents to testify that the Defendant was a vendor of narcotics yet neither of them knew this of their own personal knowledge, but it appeared this information had been obtained from telephone callers and it was not shown that those callers either knew the Petitioner personally or were even from his locality, and it was not indicated that the callers' information was obtained first hand.

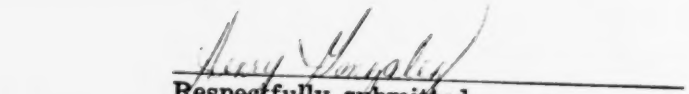
The Court stated as follows:

" Here, at least in the case of the anonymous phone calls, it could well be said that the evidence *** was so indefinite that it gave the defendant no chance or opportunity to refute it. It specified no person who made any of the complaints to which (the agent) testified. It specified no time when, place where, or circumstances surrounding any such complaints which could give the defendant any chance or opportunity to refute or contradict the testimony regarding such complaints, * * *." *Mattson v. United States,* 3 Cir., 7 F.2d 427, 428 (1925). We believe that to the extent that testimony of this character might be utilized by a jury to assay the Appellant's predisposition to commit narcotic offenses, its judgment would be but a surmise from the shadows — a guess in the dark. *Accordingly, we conclude that the admission of hearsay evidence of the character here in issue to show the predisposition of the appellant was highly prejudicial error.*" (Emphasis supplied)

" On this point, we can add little to the excellent discussion of Judge Hartigan in *Whiting v. United States,* supra, in which the Government attempted to show predisposition of the defendant by calling as rebuttal witnesses a police officer who testified that he received anonymous telephone calls informing him that the Defendant trafficked in narcotics, and another police officer and a Government agent who testified that informants had told them that the defendant was involved in the narcotics trade but who admitted that they did not know of any basis for the informants' knowledge of the defendant's activities. In reversing the judgment of conviction, the court held that the hearsay evidence introduced by the Government was impermissibly unreliable and afforded the defendant no fair opportunity to rebut it. . ." United States v. Ambrose, 483 F.2d 742 (1973).

CONCLUSION

We believe the conflicting views on the issues involved should be resolved by this Honorable Court to avoid an apparent conflict between Circuits on issues which are substantially the same. It is respectfully submitted that the Petition for Writ of Certiorari should be granted.



Respectfully submitted,

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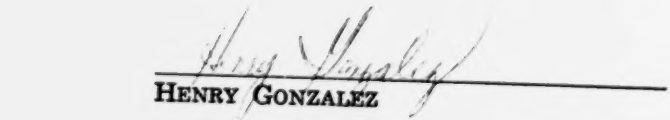
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail on this 26th day of December, 1974, to Anthony J. LaSpada, Esq., Assistant United States Attorney, U. S. Post Office Bldg., Tampa, Florida, and to the Solicitor General, Washington, D.C.



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